Supreme Court, U.S.
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(2)

No. 91-1604

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

RICHARD C. WEIDMAN
AND
W. JEFFREY WEIDMAN

Petitioners,

v.

WILLIAM WEIDMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

SUPPLEMENTAL BRIEF

Richard C. Weidman,
Pro se

W. Jeffrey Weidman,
Pro se

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II. TABLE OF AUTHORITIES

i. Cases

Allen v. Lindstrom, Allen v. Lindstrom, and McGowan v. Coldwell Banker Residential Real Estate Services, Inc., 237 Va. 489, 379 S.E.2d 450 (1989)..... 3

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Rule 5:11(b), Rules of Virginia Supreme Court..... (pass.)

III. SUPPLEMENTAL FACTS

Since the filing of Petition for Writ of Certiorari, information not previously available to Petitioners has become available to them, involving the specific failure of the Virginia Supreme Court in another case to enforce its Rule 5:11(b)[1], which the Virginia Supreme Court has held to be mandatory and jurisdictional, and upon the alleged failure to comply with which the Virginia Supreme Court denied the appeals of Petitioners.

The case in question concerns several actions consolidated in the Circuit Court of Fairfax County which were appealed to the Virginia Supreme Court (Virginia Supreme Court Record No. 860675) as Edwin H. Allen, et al. v. James Lindstrom, et al. and Edwin H. Allen, et al. v. Timothy R. McGowan, et al. In that appeal, Appellants had failed

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[1] See Petition for Writ of Certiorari, Appendix at 33.

to file any notice of filing of transcripts, as required by Rule 5:11(b). Appellees then filed a Motion to Dismiss Petition for Appeal[2] as well as a memorandum in support thereof, in which Appellees specifically cited the failure of Appellants to comply with Rule 5:11(b). In the memorandum it was stated that:

> "Rule 5:11(b) requires counsel for the appellants to promptly notify all other counsel of the date on which the transcript is filed. Compliance with the provisions of the Rule is mandatory and failure to comply constitutes a jurisdictional bar to the prosecution of the appeal. Towler v. Commonwealth, 216 Va. 533, 221 S.E.2d 119 (1976). The Allens have failed to comply with the provisions of Rule 5:11 and their Petition for Appeal should be dismissed."

The motion was summarily denied without further comment, and the petition for appeal was granted. In the brief in opposition to the appeal, Appellees again

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[2] See Appendix at 1.

raised the jurisdictional issue of noncompliance by Appellants with Rule 5:11(b), the fact of which was never contested by Appellants. The Virginia Supreme Court reversed and remanded one of the cases and reversed and rendered final judgment in the other. The opinion, however, completely ignored the issue of noncompliance with Rule 5:11(b) in spite of the fact that the objection had clearly and unmistakably been made.[3] Thus, although the case record documents the issue, the published record does not reflect the fact that in this other case noncompliance with Rule 5:11(b) was effectively held not to serve as a jurisdictional bar to appellate review. Petitioners were only informed of the unpublished facts of the record in this other case after filing their Petition for

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[3] See Allen, et al. v. Lindstrom, et al., Allen, et al. v. Lindstrom , et al., and McGowan, et al. v. Coldwell Banker Residential Real Estate Services, Inc., et al., 237 Va. 489, 379 S.E.2d 450 (1989).

Writ of Certiorari, and therefore believe this Supplemental Brief is warranted and is in compliance with Rule 15.7 of the Rules of the Supreme Court of the United States.

Petitioners reiterate that they believe that they complied in substance as well as form with the requirements of Rule 5:11(b) of the Virginia Supreme Court. However, it is clear in the case cited that the Virginia Supreme Court has in the past effectively held that for some persons even unquestionable noncompliance with Rule 5:11(b) does not necessarily serve as a jurisdictional bar to appellate review. But if an appeal be allowed to some persons and not to all persons similarly situated, such deprivation is equivalent to the denial of due process of law, as due process of law and the equal protection of the laws are secured only when the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of

government.[4]

Thus, even had Petitioners not complied with Rule 5:11(b), the invoking of the rule by the Virginia Supreme Court to deny Petitioners' request for review of questions involving their federal constitutional rights is an arbitrary exercise of the powers of government. Not only have Petitioners not received treatment on appeal which is equal to that received by Respondent, but they have also not received treatment equal to that received by other "persons similarly situated" with respect to the requirements of Virginia Supreme Court Rule 5:11(b).

Petitioners respectfully assert that the due process and equal protection issues involved in selective enforcement by the highest court of a state of a mandatory rule--which varies arbitrarily from non-

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[4] See State v. Guerringer, 265 Mo. 408, 178 S.W. 67 (1915).

enforcement to enforcement beyond the substance and even the form of the rule--warrant review by this Court through the issuance of a Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT of VIRGINIA at RICHMOND

RECORD NO. 860675

EDWIN H.ALLEN, et al.,	:	
	:	
Appellants,	:	
	:	
vs.	:	IN CHANCERY NO. 93488
	:	
JAMES LINDSTROM, et al.,	:	
	:	
Appellees.	:	
.....	:	
	:	
EDWIN H. ALLEN, et al.,	:	
	:	
Appellants,	:	
	:	
vs.	:	IN CHANCERY NO. 93960
	:	
TIMOTHY R. McGOWAN, et al.,	:	
	:	
Appellees.	:	

MOTION TO DISMISS PETITION FOR APPEAL

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IN THE SUPREME COURT of VIRGINIA at RICHMOND

EDWIN H. ALLEN, et al.,	:	
	:	
Appellants,	:	
	:	
vs.	:	
	:	
JAMES LINDSTROM, et al.,	:	
	:	
Appellees.	:	
.....	:	RECORD NO. 860675
	:	
EDWIN H. ALLEN, et al.,	:	
	:	
Appellants,	:	
	:	
vs.	:	
	:	
TIMOTHY R. McGOWAN, et al.,	:	
	:	
Appellees.	:	

MOTION TO DISMISS PETITION FOR APPEAL

To: Edwin H. Allen
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COME NOW the Appellees, TIMOTHY R. and ADELE M. McGOWAN (the "McGowans") by Counsel, and file this Motion to Dismiss the

Petition for Appeal previously served and filed herein, and in support thereof, respectfully state as follows:

1. The Order appealed from is not a Final Order.

2. The Order appealed from is not an appealable interlocutory order within the meaning of Va. Code Section 8.01-671(B).

3. The Appellants have failed to comply with the provisions of Rule 5:11.

4. Judicial economy will best be served by permitting the trial court to resolve and finally determine all the rights and obligations of the parties.

WHEREFORE, the Appellees respectfully request that the Petition for Appeal previously served and filed herein be dismissed and that this matter be remanded

to the trial court for such further proceedings or orders as may be consistent with the ruling of this Court.

TIMOTHY R. McGOWAN
ADELE M. McGOWAN
By Counsel

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